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# Just Culture and Accountability for Flight Safety Events in Australia and New Zealand

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# JUST CULTURE AND ACCOUNTABILITY FOR FLIGHT SAFETY EVENTS IN AUSTRALIA AND NEW ZEALAND

CHRISTOPHER GRIGGS\*

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## I. INTRODUCTION

**T**HERE IS A long-standing tension in the investigation of flight safety events (FSEs) between (1) the goals of aviation safety to rapidly identify causes, record lessons to be learned, and prevent recurrences; and (2) the need for individual accountability in any state which observes the rule of law.<sup>1</sup> The implication of this tension is that the aircrew will not cooperate with FSE investigations, or use equipment such as cockpit voice

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<sup>1</sup> The Honorable P. de Jersey, Chief Justice of Queensland, *The Disclosure in Evidence of Black Box Recordings*, David Boughen Memorial Address before the Aviation Law Association of Australia and New Zealand Conference (Oct. 18, 1999), available at <http://archive.sclqld.org.au/judgepub/dj181099.htm>.

recorders, if there is a risk that their evidence will then be used against them in a criminal prosecution or civil proceeding.<sup>2</sup>

There seems to be little doubt that a lack of candor by aircrew following an FSE poses a real risk to aviation safety.<sup>3</sup> A critical aspect of an FSE is the ability of investigators to rapidly identify whether the incident or accident was caused by pilot error, an equipment malfunction, an external cause, or some combination of these or other factors. If equipment malfunction cannot be ruled out quickly by an admission of pilot error, the potential also exists for significant commercial consequences for the aviation industry due to the need to ground that aircraft type as a safety precaution.

In response to this tension, the concept of "Just Culture" has evolved. It is a concept that carries a great deal of weight in the aviation community. There are various definitions of the concept, but the European Organization for the Safety of Air Navigation (EUROCONTROL) defines it as "a culture in which front line operators and others are not punished for actions, omissions, or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated."<sup>4</sup> This definition was approved in a regulation adopted by the Council of Europe on April 3, 2014,<sup>5</sup> and has attracted wide acceptance internationally.

While the concept of Just Culture would seem unobjectionable to many at first glance, the difficulty of implementing it lies in defining its scope and reconciling it with competing precepts of both international and domestic law and philosophy. It is perhaps for these reasons that Australia expressed reservations about the concept in a recent working paper presented to the

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<sup>2</sup> See SIDNEY DEKKER, JUST CULTURE: BALANCING SAFETY AND ACCOUNTABILITY 17 (2007).

<sup>3</sup> Lindsay Fenwick & Michael Huhn, *Criminal Liability and Aircraft Accident Investigation*, AIR LINE PILOT, May 2003, at 17, available at [http://www.alpa.org/portals/alpa/magazine/2003/May2003\\_CriminalLiability.htm](http://www.alpa.org/portals/alpa/magazine/2003/May2003_CriminalLiability.htm).

<sup>4</sup> *Just Culture: Finding the Right Balance Between the Aviation, Judicial and Political Authorities*, EUROCONTROL (Feb. 7, 2014), <https://www.eurocontrol.int/articles/just-culture> [hereinafter *Just Culture: Finding the Right Balance*].

<sup>5</sup> Regulation 376-2014, of the European Parliament and of the Council of 3 April 2014 on the Reporting, Analysis and Follow-up of Occurrences in Civil Aviation, 2014 O.J. (L 122) 18, 25.

International Civil Aviation Organization (ICAO) Technical Commission.<sup>6</sup>

This article looks at the extent to which the notion of Just Culture is or might be accommodated within the frameworks of law that apply to both civil and military aviation in Australia and New Zealand. It examines what, if any, international obligations these countries might have in relation to the implementation of Just Culture and measures their respective domestic laws against the applicable international standards. The article concludes that Just Culture is only partially implemented in Australia and New Zealand and to varying degrees. Finally, this article examines the case for full implementation within a philosophical context.

## II. JUST CULTURE AND INTERNATIONAL AVIATION LAW

The principal treaty governing aviation safety under international law is the Chicago Convention.<sup>7</sup> However, given the scope of this article, it should be recognized that while the Chicago Convention applies to civil aircraft, it does not apply to state aircraft, i.e., “aircraft used in military, customs and police services.”<sup>8</sup>

Article 37 of the Chicago Convention authorizes ICAO to: “adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures

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<sup>6</sup> *Some Caveats on “Just Culture”* (Int’l Civil Aviation Org., Working Paper No. A37-WP/289, 2010), available at [http://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp289\\_en.pdf](http://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp289_en.pdf).

<sup>7</sup> Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, [hereinafter Chicago Convention]. The Chicago Convention entered into force for Australia on April 4, 1947, and for New Zealand on April 6, 1947. *Convention on International Civil Aviation Signed at Chicago on 7 December 1944*, INT’L CIVIL AVIATION ORG., [http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf) (last visited Nov. 22, 2014).

<sup>8</sup> Chicago Convention, *supra* note 7, art. 3. Milde argues that Article 3(b) does not exhaustively define the scope of “state aircraft” for the purposes of the Chicago Convention. MICHAEL MILDE, *INTERNATIONAL AIR LAW AND ICAO 70* (2008). However, EUROCONTROL and most other commentators are of the view that it does. See *Definition of State Aircraft*, EUROCONTROL, <https://www.eurocontrol.int/sites/default/files/content/documents/single-sky/cm/library/cmac-definition-of-state-aircraft-200107.pdf> (last visited Nov. 22, 2014); THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES 139 (Natalino Ronzitti & Gabriella Venturini eds., 2006); Michel Bourbonnière & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 900 (2001).

dealing with . . . investigation of accidents.”<sup>9</sup> Article 26 of the Chicago Convention provides that contracting states must investigate FSEs with respect to foreign-registered aircraft in their national airspace in accordance with the ICAO procedures if the FSE involves death or serious injury, or indicates a serious technical defect in the aircraft or air navigation facilities, “so far as [their] laws permit.”<sup>10</sup>

The ICAO Council first adopted Standards and Recommended Practices (SARPs) for Aircraft Accident Inquiries on April 11, 1951, designating that instrument as Annex 13 to the Chicago Convention (Annex 13).<sup>11</sup> Annex 13 is now in its tenth edition.<sup>12</sup> It contains a number of important benchmarks supporting the limited application of Just Culture in respect of FSE investigations. First, Standard 3.1 provides that: “The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.”<sup>13</sup> Second, Chapter 5 provides that the FSE investigation must be kept separate from “any judicial or administrative proceedings to apportion blame or liability.”<sup>14</sup> It recognizes the need for coordination between accident investigators and criminal investigators,<sup>15</sup> but states that certain evidence should not ordinarily be shared with the latter by an accident investigator, namely:

- statements taken during the FSE investigation;
- “communications between persons . . . involved in the operation of the aircraft”;
- “medical or private information regarding persons involved in the [FSE]”;
- cockpit voice recorder (CVR) recordings and transcripts;
- air traffic control unit recordings and transcripts;
- “cockpit airborne image recordings and . . . transcripts”;
- and

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<sup>9</sup> Chicago Convention, *supra* note 7, art. 37.

<sup>10</sup> *Id.* art. 26.

<sup>11</sup> INT’L CIVIL AVIATION ORG., ANNEX 13 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION: AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION, at ix, x (10th ed. 2010) [hereinafter ANNEX 13].

<sup>12</sup> *Id.* at i.

<sup>13</sup> ANNEX 13, *supra* note 11, at para. 3.1.

<sup>14</sup> *Id.* at para. 5.4.1.

<sup>15</sup> *Id.* at para. 5.10.

- “opinions expressed in the analysis of information, including flight recorder information.”<sup>16</sup>

The only exception to this restriction permitted by Annex 13 is where “the appropriate authority for the administration of justice in that [s]tate determines that [the necessity of disclosing such information] outweighs the adverse domestic and international impact such action may have on that or any future investigations.”<sup>17</sup>

While the SARPs are not themselves binding treaty obligations,<sup>18</sup> any contracting state that does not adopt domestic legislation consistent with a standard must report the inconsistency to ICAO.<sup>19</sup> The Chicago Convention essentially authorizes ICAO to “name and shame” any such state—ordinarily a powerful disincentive in the diplomatic sphere. However, in its 2013 Safety Report, ICAO reported that global implementation of SARPs relating to accident investigation still stands at only 51%.<sup>20</sup>

Data like this has led some commentators to make uncomplimentary remarks about the gulf between ICAO standards and actual implementation.<sup>21</sup> Indeed, the continuing use of evidence collected by FSE investigations for domestic prosecutions led the 35th Session of the ICAO Assembly in 2004 to adopt resolution A35-17, in which the Assembly:

*Concerned* by a trend for safety information to be used for disciplinary and enforcement actions and to be admitted as evidence in judicial proceedings; . . .

*Mindful* that the use of safety information for other than safety-related purposes may inhibit the provision of such information, with an adverse effect on aviation safety;

*Considering* that a balance needs to be struck between the need for the protection of safety information and the need for the proper administration of justice; . . .

1. *Instructs* the Council to develop appropriate legal guidance . . .
2. *Urges* all Contracting States to examine their existing legislation and adjust as necessary, or enact laws and regula-

<sup>16</sup> *Id.* at para. 5.12.

<sup>17</sup> *Id.*

<sup>18</sup> *N.Z. Air Line Pilots' Ass'n Inc. v Attorney-Gen.* [1997] 3 NZLR 269 (CA) 280.

<sup>19</sup> Chicago Convention, *supra* note 7, art. 38.

<sup>20</sup> 2013 Safety Report, INT'L CIVIL AVIATION ORG. (Feb. 25, 2014), [http://www.icao.int/safety/Documents/ICAO\\_2013-Safety-Report\\_FINAL.pdf](http://www.icao.int/safety/Documents/ICAO_2013-Safety-Report_FINAL.pdf).

<sup>21</sup> MILDRED TRÖGELER, CRIMINALISATION OF AIR ACCIDENTS AND THE CREATION OF A JUST CULTURE 4–6 (2014), *available at* <http://media.leidenuniv.nl/legacy/mildred-tr-366geler-eala-prize.doc>.pdf.

tions to protect information gathered from all relevant safety data collection and processing systems based, to the extent possible, on the legal guidance developed by ICAO . . .<sup>22</sup>

The legal guidance referred to in resolution A35-17 is now found at Attachment E to Annex 13.<sup>23</sup> At its thirty-eighth session late last year, the ICAO Assembly directed the Council to take steps to strengthen that guidance and related parts of Annexes 13 and 19.<sup>24</sup> As it stands, Attachment E establishes a body of principles governing the use of aviation safety information where that information was collected “for explicit safety purposes and the disclosure of the information would inhibit its continued availability.”<sup>25</sup> Those principles largely replicate the relevant parts of Chapter 5 of Annex 13 referred to above but also recognize that a contracting state’s domestic law may properly permit the disclosure of aviation safety information for a prosecution where the evidence or circumstances indicate that the relevant conduct was committed<sup>26</sup> “with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct. . . .”<sup>27</sup>

The legal guidance goes even further with respect to cockpit voice recorders (CVRs):

Considering that ambient workplace recordings required by legislation, such as cockpit voice recorders (CVRs), may be perceived as constituting an invasion of privacy for operational personnel that other professions are not exposed to, . . . subject to the principles of protection and exception above, national laws and regulations should consider ambient workplace recordings required by legislation as privileged protected information, i.e. information deserving enhanced protection. . . .<sup>28</sup>

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<sup>22</sup> INT’L CIVIL AVIATION ORG., RESOLUTION ADOPTED BY THE ASSEMBLY 17 (2004), available at [http://www.icao.int/Meetings/AMC/MA/Assembly%2035th%20Session/a35\\_res\\_prov\\_en.pdf](http://www.icao.int/Meetings/AMC/MA/Assembly%2035th%20Session/a35_res_prov_en.pdf).

<sup>23</sup> INT’L CIVIL AVIATION ORG., ANNEX 13 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, ATTACHMENT E, LEGAL GUIDANCE FOR THE PROTECTION OF INFORMATION FROM SAFETY DATA COLLECTION AND PROCESSING SYSTEMS (2010) [hereinafter ATTACHMENT E].

<sup>24</sup> Int’l Civil Aviation Org. [ICAO], *Assembly Resolution in Force (as of 4 October 2013)*, at I-103-04, II-28 ICAO Doc. 1 0022 (2014).

<sup>25</sup> ATTACHMENT E, *supra* note 23, para. 3.1.

<sup>26</sup> *Id.* at para. 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at para. 7.

It follows that, in broad terms, ICAO SARPs require contracting states to keep the evidence with respect to an FSE investigation separate from whatever evidence might be collected to support a prosecution. The only exception to this is in cases of reckless conduct, gross negligence, or willful misconduct.<sup>29</sup> Even in those cases, the ICAO legal guidance suggests that CVR recordings should not be admissible under domestic law.<sup>30</sup>

In many cases, if the restrictions on evidence-sharing required by Annex 13 are observed by a contracting state, they are likely to inhibit the successful prosecution of alleged offenses in the less serious category. This is consistent with Just Culture. However, what the SARPs fail to do explicitly is discourage national law enforcement agencies from collecting their own evidence to support a prosecution within that category.<sup>31</sup> A fully fledged Just Culture would align the relevant state's prosecution policy with the evidence-sharing exception in Annex 13 so that the state's authorities would only prosecute if the alleged conduct was sufficiently serious to warrant the admissibility of material from the safety investigation.<sup>32</sup>

Furthermore, as mentioned above, there is a significant—and worrisome—gap between the provisions of Annexes 13 and 19 on the one hand and the actual implementation of those provisions in the domestic law of contracting states on the other. The difficulty lies in the fact that the SARPs are effectively “soft law”—i.e., “norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between [s]tates but do not create enforceable rights and duties.”<sup>33</sup>

Much effort has been devoted within ICAO towards improving the wording of the SARPs. That is laudable. However, what is needed to make a real difference to international compliance with those SARPs is a paradigm shift. The key standards encapsulated in the SARPs should be given binding effect at interna-

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<sup>29</sup> *Id.* at para. 4.

<sup>30</sup> *Id.* at para. 7.

<sup>31</sup> See, e.g., Annex 19, which states at Attachment A that contracting states should establish “the conditions and circumstances under which to deal with safety deviations through established enforcement procedures,” without providing any guidance in that respect. INT’L CIVIL AVIATION ORG., ANNEX 19 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION: SAFETY MANAGEMENT, ATTACHMENT A, FRAMEWORK FOR A STATE SAFETY PROGRAM § 1.4 (1st ed. 2013).

<sup>32</sup> Tony Licu et al., *Everything You Always Wanted to Know About Just Culture (But Were Afraid to Ask)*, 18 HINDSIGHT 14 (2013).

<sup>33</sup> Richard R. Baxter, *International Law in “Her Infinite Variety”*, 29 INT’L & COMP. L.Q. 549 (1980).



tional law under an amendment, or perhaps a new protocol, to the Chicago Convention. Even more importantly, aircraft should not be permitted to undertake international air navigation unless the state of registry complies with those standards. States hosting key international hub airports, like China, Japan, the United Arab Emirates, the United Kingdom, and the United States, could have an important role in that respect. However, in the current diplomatic climate, adoption of binding international rules may be an unrealistic target, noting that comparable provisions regulating the investigation of marine casualties under the International Convention for the Safety of Life at Sea (SOLAS),<sup>34</sup> which came into force on January 1, 2010, were crafted in a largely non-binding format with respect to the matters covered by Annexes 13 and 19.<sup>35</sup> Despite this, the goal of uniformity in the implementation of aviation safety standards, based on binding rules of international law, is one to which the international aviation community should aspire. In an age of increasing interconnectedness and air travel across the globe by citizens of all nations using diverse carriers, a failure to pursue this goal imperils the fundamental duty of every contracting state towards its own citizens.

The next part of this article examines the extent to which Just Culture and specifically the SARPs discussed above have been incorporated into domestic law in Australia and New Zealand.

### III. JUST CULTURE UNDER AUSTRALIAN LAW

The Commonwealth Parliament has power under the Australian Constitution to legislate for aviation safety throughout Australia and, in the case of Australian-registered aircraft, outside Australia.<sup>36</sup> This power has been exercised with respect to the investigation of FSEs through the enactment of the Civil Aviation Act of 1988 and the Transport Safety Investigation Act of 2003 (TSI Act).

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<sup>34</sup> Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 277; Efthimios E. Mitropoulos, Sec'y Gen., Int'l Mar. Org., Speech at the Marine Accident Investigators' International Forum (Sept. 29, 2008).

<sup>35</sup> See Int'l Maritime Org. [IMO], *Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended*, IMO Safety Comm. Res. MSC.257(84), annex 3, reg 6 (May 16, 2008).

<sup>36</sup> *Airlines of NSW Pty. Ltd. v New South Wales (No. 2)* (1965) 113 C.L.R. 54 (H.C.A.). Laws made by the Commonwealth, as the federal government of Australia, are designated (Cth.) to distinguish them from laws made by Australian state and territory governments.

These two Commonwealth Acts establish two separate agencies with authority to conduct parallel investigations following an FSE. The Australian Transport Safety Bureau (ATSB) is Australia's transport accident investigator, fulfilling the role described in Annex 13.<sup>37</sup> The Civil Aviation Safety Authority (CASA) is, *inter alia*, the Commonwealth's aviation enforcement authority.<sup>38</sup> The two agencies may investigate any FSE involving a civil aircraft<sup>39</sup> in Australia or registered in Australia.<sup>40</sup> The ATSB may also

- investigate any FSE involving a civil aircraft owned by the Commonwealth, a State, or a Territory;<sup>41</sup> or
- cooperate in the investigation of an FSE in which Australia is neither the territorial nor national authority, for example if evidence in relation to the event is found in Australia.<sup>42</sup>

However, neither agency may investigate an FSE that involves a foreign military, police, or customs aircraft.<sup>43</sup> CASA does not have enforcement jurisdiction with respect to Australian Defence Force (ADF) aircraft,<sup>44</sup> and the ATSB may only investigate an event involving such aircraft if an "appropriate authority" in the ADF has requested it to do so, unless the aircraft has been registered under civil aviation law.<sup>45</sup> In practice, FSEs involving ADF aircraft will generally be investigated by the ADF's Directorate of Defence Aviation and Air Force Safety (DDAAFS).<sup>46</sup> There is, however, a memorandum of understanding between the ATSB and DDAAFS that provides for mutual cooperation in FSE investigations, particularly with respect to events involving both civil and ADF aircraft.<sup>47</sup> In some cases, such as a crash, a

<sup>37</sup> *Transportation Safety Investigation Act 2003* (Cth) s 12 (Austl.) [hereinafter *TSI Act*].

<sup>38</sup> *Civil Aviation Act 1988* (Cth) s B(1) (Austl.) [hereinafter *Civil Aviation Act*].

<sup>39</sup> *Civil Aviation Act*, *supra* note 38, s 7; *TSI Act*, *supra* note 37, ss 21, 22.

<sup>40</sup> Unless, in the case of CASA, responsibility for regulating that aircraft has been passed to another contracting state pursuant to an agreement under Article 83 *bis* of the Chicago Convention.

<sup>41</sup> See Section 3 of the *TSI Act* for the definition of "Australian aircraft." *TSI Act*, *supra* note 37, s 3.

<sup>42</sup> *Id.* at s 22(1)(c).

<sup>43</sup> *Id.* s 3; *Civil Aviation Act*, *supra* note 38, s 3.

<sup>44</sup> *Civil Aviation Act*, *supra* note 38, s 4.

<sup>45</sup> *TSI Act*, *supra* note 37, ss 22(2), 22(3).

<sup>46</sup> See AUSTRALIAN TRANSP. SAFETY BUREAU, DEP'T OF DEF., HAZARDS AT AIRCRAFT SITES: GUIDANCE FOR POLICE AND EMERGENCY PERSONNEL 5 (6th ed. Jan. 2014).

<sup>47</sup> Memorandum of Understanding Between the Australian Transport Safety Bureau and the Department of Defence Directorate of Defence Aviation and Air Force Safety for Cooperation Relating to Transport Safety Investigation (Feb. 19,

separate ADF inquiry will be appointed by a senior commander to inquire into the matter under the Defence (Inquiry) Regulations of 1985.<sup>48</sup>

Both the ATSB and CASA may investigate an FSE involving a state aircraft operated by the Australian Customs and Border Protection Service or an Australian police service, in which respect they have broader jurisdiction than is envisaged under the Chicago Convention. The Civil Aviation Act and the TSI Act explicitly require CASA and the ATSB to comply with Australia's international obligations in the area of FSE investigation under the Chicago Convention.<sup>49</sup> Section 12AD of the TSI Act, inserted in 2009, provides that:

- (1) The ATSB must ensure that the ATSB's powers under this Act are exercised in a manner that is consistent with Australia's obligations under international agreements (as in force from time to time) that are identified by the regulations for the purpose of this section.
- (2) The Chief Commissioner must ensure that the Chief Commissioner's powers under this Act are exercised in a manner that is consistent with Australia's obligations under international agreements (as in force from time to time) that are identified by the regulations for the purpose of this section.
- (3) In exercising powers under this Act, the ATSB and the Chief Commissioner must also have regard to any rules, recommendations, guidelines, codes, or other instruments (as in force from time to time) that are promulgated by an international organisation and that are identified by the regulations for the purposes of this section.<sup>50</sup>

Regulation 5.3 of the Transport Safety Investigation Regulations of 2003 specifically identifies all of the international obligations referred to above under the Chicago Convention as obligations to which Section 12AD of the TSI Act applies.<sup>51</sup>

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2014), available at <http://www.atsb.gov.au/media/4075561/atsb%20ddaafs%20mou%202013.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> *Civil Aviation Act*, *supra* note 38, s 11; *TSI Act*, *supra* note 37, s 12AD.

<sup>50</sup> *Transport Safety Investigation Amendment Act 2009* (Cth), sch 1, pt 2 dir 1 (Austl.).

<sup>51</sup> *TSI Act*, *supra* note 37, reg 5.3.

This general commitment to the approach to FSE investigation mandated by Annex 13 is bolstered by a number of specific provisions in the TSI Act. Section 12AA(3) of the Act, also inserted in 2009, provides that it is not the function of the ATSB:

- [T]o apportion blame for transport safety matters;
- to provide the means to determine the liability of any person in respect of a transport safety matter;
- to assist in court proceedings between parties (except as provided by the TSI Act, whether expressly or impliedly);
- to allow any adverse inference to be drawn from the fact that a person was involved in a transport safety matter.<sup>52</sup>

There are however two important provisos to this section:

- (1) the mere fact that a third party may draw an adverse inference, or infer blame or liability, from evidence collected by the ATSB “does not prevent the ATSB from carrying out its functions,” and
- (2) the fact that blame attribution is not part of the ATSB’s function does not preclude a separate criminal or regulatory investigation from being conducted that may lead to prosecution.<sup>53</sup>

This reflects the separate role of CASA in conducting investigations with a view towards ensuring compliance through practices including the application of administrative enforcement measures or prosecution.<sup>54</sup>

In keeping with this separation of roles, Section 60 of the TSI Act prevents evidence collected by the ATSB in an FSE investigation from being admitted in any subsequent criminal or civil proceedings, unless:

- the criminal proceedings relate to an offense against the TSI Act;<sup>55</sup> or
- in the case of civil proceedings, the ATSB issues a certificate that the disclosure of the information is not likely to interfere with any investigation, and the court makes an order for disclosure on the grounds that it “is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or fu-

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<sup>52</sup> *Id.* s 12AA(3).

<sup>53</sup> *Id.* ss 12AA(3)–(4).

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* s 60(4)(b).

ture investigations is outweighed by the public interest in the administration of justice.”<sup>56</sup>

In the military context, the protection afforded by Section 60 does not apply, but the separation is even more strict with respect to proceedings brought against a witness in an inquiry into an FSE. Section 124(2C) of the Defence Act of 1903 provides that:

A statement or disclosure made by a witness in the course of giving evidence before a court of inquiry, a board of inquiry, a Chief of the Defence Force commission of inquiry, an inquiry officer or an inquiry assistant is not admissible in evidence against that witness in:

(a) any civil or criminal proceedings in any federal court or court of a State or Territory; or

(b) proceedings before a service tribunal;

otherwise than in proceedings by way of a prosecution for giving false testimony at the hearing before the court of inquiry, the board of inquiry, the Chief of the Defence Force commission of inquiry, the inquiry officer or the inquiry assistant.<sup>57</sup>

In this respect, Australian law can be seen in most cases to apply even stricter controls on the judicial use of FSE investigations than is required by Standard 5.12 of Annex 13.<sup>58</sup>

Furthermore, reflecting the concern expressed in the ICAO legal guidance about the use of CVR recordings in judicial proceedings, the Commonwealth Parliament has enacted legislation providing that, with very limited exceptions, CVR recordings are not admissible in criminal or civil proceedings against a member of the aircrew in an Australian court.<sup>59</sup> These rules of evidence also apply to courts martial and defence force magistrates exercising jurisdiction over an alleged offense by military aircrew under the Defence Force Discipline Act of 1982.<sup>60</sup>

The conclusion to be drawn from this analysis is that Australian law is at least consistent with the Annex 13 requirement to

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<sup>56</sup> *Id.* ss 60(4)(c), (5)–(6); *see, e.g., Elbe Shipping SA v Giant Marine Shipping SA* [2007] 159 FCR 518 (Austl.), in which the Federal Court considered the constitutional validity of Section 60(5).

<sup>57</sup> *Defence Act 1903* (Cth) s 124(2c) (Austl.).

<sup>58</sup> *See id.*

<sup>59</sup> *Transportation Safety Investigation (Consequential Amendments) Act 2003* (Cth) sch 1 (Austl.). Prior to 2003, the relevant law was located in the *Air Navigation Act 1920* (Cth.) (Austl.).

<sup>60</sup> *Defence Force Discipline Act 1982* (Cth) s 146 (Austl.).

keep the evidence in respect of a safety investigation separate from whatever evidence might be collected to support a prosecution. As indicated above, however, that is only part of a fully developed Just Culture.<sup>61</sup> The question is whether the Commonwealth authorities are prepared to rule out the prosecution of offenses arising from FSEs that do not meet the Just Culture threshold of reckless conduct, gross negligence, or willful misconduct.

The Civil Aviation Regulations of 1988 contain a large number of strict liability offenses applicable to civil aviation. For example, subject to certain limited exceptions, the pilot of a fixed-wing aircraft commits an offense if he or she flies the aircraft over a town at an altitude lower than 1,000 feet above ground level.<sup>62</sup> In the case of military aviators, the Defence Force Discipline Act prescribes general offenses of negligent performance of duty and negligent low flying.<sup>63</sup> These are all offenses which fall below the Just Culture threshold; they would not require proof of any intent or even gross negligence.

The CASA enforcement policy makes it clear that the discretion to prosecute in cases involving civil aircraft is that of the Commonwealth Director of Public Prosecutions (CDPP):

It is important for all officers to recognise the role that is played by the CDPP in the criminal enforcement of all Commonwealth laws, including the Act and the regulations. While CASA is responsible for investigating offences against the Act and the regulations, the function of prosecuting offences rests with the CDPP. . . . While the Prosecution Policy of the Commonwealth (PPC) provides discretion as to what matters an agency investigates, the PPC requires that where an investigation discloses sufficient evidence of a serious offence, that the CDPP must be consulted. Where CASA considers that the public interest does not warrant prosecution or that some other action is appropriate, the CDPP has advised that it must still be consulted in relation to matters of real gravity. In deciding whether a prosecution should be instituted or continued the CDPP will consider carefully any views of CASA. However, the final decision on whether to prosecute or not rests with the CDPP.<sup>64</sup>

Depending on how one interprets “serious offence” and “matters of real gravity,” it may be argued that the CASA enforce-

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<sup>61</sup> See *supra* text accompanying notes 30–32.

<sup>62</sup> *Civil Aviation Regulations 1988* (Cth) reg 157 (Austl.).

<sup>63</sup> *Defence Force Discipline Act 1982* (Cth) ss 35, 41 (Austl.).

<sup>64</sup> CIVIL AVIATION SAFETY AUTH., ENFORCEMENT MANUAL 11-3 (2013).

ment policy provides scope for the application of Just Culture by that agency.<sup>65</sup> CASA also has a range of alternative enforcement options at its disposal—e.g., Aviation Infringement Notices, demerit points, suspension of license under CAR 265, or other administrative action.<sup>66</sup> Based on an Australian working paper, ICAO's Safety Information Protection Task Force has adopted the view that such alternative enforcement options do not constitute "punishment" for the purposes of a Just Culture analysis, if they are used exclusively for remedial or protective purposes.<sup>67</sup> In contrast, neither the Prosecution Policy of the Commonwealth,<sup>68</sup> nor—in the case of military aviators—that of the Director of Military Prosecutions,<sup>69</sup> make specific provision for the adoption of Just Culture as a guiding principle in the exercise of prosecutorial discretion following an FSE.

#### IV. JUST CULTURE UNDER NEW ZEALAND LAW

It should come as no great surprise that the regulatory framework governing the investigation of FSEs in New Zealand is quite similar to that in Australia. The Civil Aviation Act of 1990 (N.Z.) and Transport Accident Investigation Commission Act of 1990 (N.Z.) (TAIC Act) establish two separate agencies with authority to conduct parallel investigations following an FSE. The Transport Accident Investigation Commission (TAIC)<sup>70</sup> is New Zealand's transport accident investigator, fulfilling the role described in Annex 13. The Civil Aviation Authority (CAA)<sup>71</sup> is, *inter alia*, New Zealand's civil aviation enforcement authority.

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<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at vii–ix.

<sup>67</sup> *Some Caveats on "Just Culture"*, *supra* note 6, at 4. The 38th Assembly of the ICAO has instructed the Council to take steps to implement the Task Force's recommendations in the SARPs. INT'L CIVIL AVIATION ORG., RESOLUTIONS ADOPTED BY THE ASSEMBLY 6 (Nov. 2013), available at [http://www.icao.int/Meetings/a38/Documents/Resolutions/a38\\_res\\_prov\\_en.pdf](http://www.icao.int/Meetings/a38/Documents/Resolutions/a38_res_prov_en.pdf).

<sup>68</sup> OFFICE OF THE DIR. OF PUB. PROSECUTIONS, PROSECUTION POLICY OF THE COMMONWEALTH 1 (Feb. 14, 2014), available at <http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>.

<sup>69</sup> OFFICE OF THE DIR. OF MILITARY PROSECUTIONS, DEP'T OF DEFENSE, REPORT FOR THE PERIOD 1 JANUARY TO 31 DECEMBER 2012 (2013), available at [http://www.defence.gov.au/publications/DMP\\_Annual\\_Report\\_2012.pdf](http://www.defence.gov.au/publications/DMP_Annual_Report_2012.pdf).

<sup>70</sup> TAIC (pronounced "take" in New Zealand) was established pursuant to Section 3 of the TAIC Act. Transportation Accident Investigation Commission Act 1990 s 3 (N.Z.).

<sup>71</sup> The CAA of New Zealand was established pursuant to Section 72A of the Civil Aviation Act. Civil Aviation Act 1990 s 72A (N.Z.).

The two agencies may investigate any FSE involving a civil aircraft<sup>72</sup> in New Zealand or registered in New Zealand.<sup>73</sup> TAIC may also cooperate in the investigation of an FSE in which New Zealand is neither the territorial nor national authority, for example if evidence in relation to the event is found in New Zealand.<sup>74</sup>

By comparison with Australia, New Zealand's statutory law appears to provide broader scope for TAIC to conduct an investigation into an FSE involving a military aircraft. Section 13(3) of the TAIC Act provides that TAIC's duty to investigate an accident or incident includes "the power to investigate any aviation . . . accident or incident that involves any combination of military and non-military persons [or aircraft]."<sup>75</sup> This power must, however, be read in the context of Section 2A(2)(a) of the TAIC Act, which provides that nothing in that Act may be interpreted as limiting the privileges and immunities of a foreign military aircraft.<sup>76</sup> At international law, a foreign military aircraft in New Zealand enjoys sovereign immunity.<sup>77</sup> As a consequence, TAIC could only lawfully exercise many of its investigative powers, including its powers of entry and seizure,<sup>78</sup> with respect to a foreign military aircraft with the consent of that aircraft's sending state.<sup>79</sup> There is an interesting question in international law as to whether sovereign immunity subsists with respect to foreign military aircraft wreckage, but that is beyond the scope of this article.<sup>80</sup>

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<sup>72</sup> Civil Aviation Act 1990 s 4 (N.Z.); Transport Accident Investigation Commission Act 1990 s 13 (N.Z.). As a general rule, an FSE investigation by TAIC is triggered by a mandatory notification from the CAA. Civil Aviation Act 1990 s 27 (N.Z.).

<sup>73</sup> Unless, in the case of the CAA, responsibility for regulating that aircraft has been passed to another contracting state pursuant to an agreement under Article 83 *bis* of the Chicago Convention. See Civil Aviation Act 1990 s 4(2) (N.Z.).

<sup>74</sup> See Transport Accident Investigation Commission Act 1990 s 8(2)(e) (N.Z.).

<sup>75</sup> "Military" is defined by Section 13(8) of the TAIC Act as relating to either the New Zealand Defence Force or a visiting force. *Id.* s 13(8).

<sup>76</sup> *Id.* s 2A(2).

<sup>77</sup> See JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 448 (8th ed. 2013); *United Kingdom Materials on International Law 1985*, 56 *BRIT. Y.B. INT'L L.* 462-67 (1985) (discussing the diplomatic and legal proceedings following the forced landing of a Royal Navy Sea Harrier on the cargo deck of the Spanish-flagged merchant ship *Abraigo* in June 1983).

<sup>78</sup> Transport Accident Investigation Commission Act 1990 s 12 (N.Z.).

<sup>79</sup> See CRAWFORD, *supra* note 77, at 448.

<sup>80</sup> See *id.*



In practice, an FSE involving New Zealand Defence Force (NZDF) aircraft will be investigated by the Royal New Zealand Air Force (RNZAF) Directorate of Air Force Safety and Health and, in most cases, will be the subject of a court of inquiry assembled under Section 200A of the Armed Forces Discipline Act of 1971 (N.Z.).<sup>81</sup> This will be so whether there is a parallel TAIC investigation or not, as Section 14(6) of the TAIC Act provides that "[w]here an incident or accident . . . is being investigated by the Commission and the New Zealand Defence Force, or a visiting force, the Commission and the Chief of Defence Force shall take all reasonable measures to ensure that the investigations are co-ordinated."<sup>82</sup>

In line with Australian military law, evidence adduced before an NZDF court of inquiry is not admissible and may not be used against any person in any other proceedings.<sup>83</sup> The inadmissibility applies to "any evidence in respect of the proceedings," which raises an interesting and as yet unresolved question as to whether it applies to pre-existing documents, such as flight logs, which are not created by the court of inquiry but nevertheless received in evidence by that court.<sup>84</sup>

The TAIC Act, in contrast, divides the information that may be collected by TAIC in the course of an FSE investigation into two discrete categories.<sup>85</sup> The first category may be broadly understood as including all information that is created in the course of the TAIC investigation.<sup>86</sup> Information in this category is not admissible in any proceeding against any person.<sup>87</sup> The second category consists of:

- a cockpit voice or video recording from a non-military aircraft;
- a transcript of any such recording; or

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<sup>81</sup> See Armed Forces Discipline Act 1971 (N.Z.).

<sup>82</sup> Transport Accident Investigation Commission Act 1990 s 14(6) (N.Z.).

<sup>83</sup> Armed Forces Discipline Act 1971 s 2005 (N.Z.); see also *R v Neave* [1995] NZCMAR 230 (CA). The exception in respect to proceedings for false statement or perjury, which applies under Australian law, also applies under New Zealand law. See *supra* text accompanying note 56.

<sup>84</sup> Armed Forces Discipline Act 1971 s 2005 (N.Z.).

<sup>85</sup> See Transport Accident Investigation Commission Act 1990 s 14B (N.Z.).

<sup>86</sup> *Id.* s 14B(2).

<sup>87</sup> *Id.* s 14B(1)(b).

- any document containing personal information obtained by TAIC during an investigation which was not created in the course of that investigation.<sup>88</sup>

Information in the second category “is not admissible against a member of the flight crew of a military or a non-military aircraft in any proceedings.”<sup>89</sup> Such information may, however, be obtained and produced under an order for discovery in civil proceedings before the High Court of New Zealand, subject to the application of strict criteria.<sup>90</sup>

Again, the conclusion to be drawn from this analysis is that New Zealand law is consistent with the Annex 13 requirement to keep the evidence with respect to a safety investigation separate from whatever evidence might be collected to support a prosecution. As indicated above, however, that is only part of a fully developed Just Culture. The question is whether the New Zealand authorities are prepared to rule out the prosecution of offenses arising from FSEs that do not meet the Just Culture threshold of reckless conduct, gross negligence, or willful misconduct.

Under Section 43A of the Civil Aviation Act, the pilot of a civil aircraft commits an offense if he or she operates the aircraft in a careless manner.<sup>91</sup> In the case of military aviators, the Armed Forces Discipline Act prescribes similar offenses of negligent performance of duty and negligently hazarding an aircraft.<sup>92</sup> These are all offenses of negligence *simpliciter*—i.e., they would not require proof of gross negligence.<sup>93</sup>

In the civil aviation context, the prosecution policy of the CAA is set out in its Regulatory Enforcement Policy, released on November 21, 2013.<sup>94</sup> It does not explicitly mandate the application of Just Culture in the exercise of prosecutorial discretion, but there are some indications in that direction. For example, in paragraph 5.4 the policy states: “The CAA prefers not to take enforcement action against those who fully report details of accidents and incidents pursuant to Civil Aviation Rule Part 12.

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<sup>88</sup> *Id.* s 14C(2).

<sup>89</sup> *Id.* s 14D(2).

<sup>90</sup> *Id.* ss 14E–14J.

<sup>91</sup> Civil Aviation Act 1990 s 43A (N.Z.).

<sup>92</sup> Armed Forces Discipline Act 1971 ss 73(1)(d), 64(2) (N.Z.).

<sup>93</sup> See, e.g., *Civil Aviation Authority v Gunn* (unreported) District Court, Queenstown, CRI-2011-059-000314, 7 March 2013, Phillips J, at paras. 7, 6 (N.Z.).

<sup>94</sup> CIVIL AVIATION AUTH. OF N.Z., REGULATORY ENFORCEMENT POLICY 2 (Nov. 21, 2013)

However, enforcement action is more likely to result when reporting is patently incomplete or reveals reckless or repetitive at-risk behaviours.”<sup>95</sup> In paragraph 5.5, the policy further states:

Consistent with the public interest test in the Solicitor-General’s Prosecution Guidelines, the CAA applies proportionality and consistency principles to take into account the aviation safety regulatory environment. This ensures that enforcement actions are proportionate to the risks and the potential for harm posed in any given situation. It also provides clarity to aviation participants as to how the Regulatory Enforcement Policy will be applied.<sup>96</sup>

In contrast, there is little scope for the application of Just Culture in New Zealand’s military aviation context. This is because Section 102(1) of the Armed Forces Discipline Act provides that an accused aviator’s commanding officer must initiate a prosecution “unless he or she considers that the allegation is not well founded.”<sup>97</sup> In New Zealand’s Manual of Armed Forces Law, “well founded” is defined exclusively in terms of evidential sufficiency.<sup>98</sup> The implication of this is that the commanding officers of RNZAF squadrons do not have a prosecutorial discretion—they have a prosecutorial duty.<sup>99</sup> Given that their Australian counterparts do have prosecutorial discretion, it may be time for the New Zealand Parliament (or the courts) to revisit this, although such a re-examination would need to be conducted in a broader military justice context than solely that of military FSEs.

## V. JUST CULTURE AND THE PHILOSOPHY OF CRIMINAL LAW

To make sense of the arguments for and against Just Culture in the aviation and legal communities, it is necessary to put the administration of criminal justice into its proper philosophical context:

When trying to make sense of an institution that causes as much hardship as our system of criminal justice, it is perfectly natural to ask what good we mean to bring about through all this suffering. Indeed, this question has been the central focus of both ma-

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<sup>95</sup> *Id.* at 4.

<sup>96</sup> *Id.*

<sup>97</sup> Armed Forces Discipline Act 1971 s 102(1) (N.Z.).

<sup>98</sup> N.Z. DEF. FORCE, MANUAL OF ARMED FORCES LAW: COMMANDER’S HANDBOOK ON MILITARY LAW, § 2, para. 4.2.2 (Mar. 31, 2014), available at [http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/483579/New\\_Zealand\\_LOAC\\_Manual.pdf](http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/483579/New_Zealand_LOAC_Manual.pdf).

<sup>99</sup> See *id.*

jor schools in punishment theory for centuries. Utilitarians suggest that this hardship is ultimately worthwhile because it prevents more harm than it causes (through deterrence, rehabilitation, etc). Most retributivists suggest that punishing the guilty is itself an important goal to be pursued.<sup>100</sup>

The principal philosophical argument in favor of Just Culture in an aviation context is precisely that, from a utilitarian standpoint, the prosecution of aircrew following an FSE does not promote aviation safety and in fact is inimical to it:

Whilst the argument is sometimes mounted that the sanction of criminal or civil prosecution will encourage increased compliance by aviation professionals, thereby enhancing aviation safety, this is, at best, questionable. In fact, such an argument is a manifestation of what has been described as “the fallacy of the perfectibility approach.” The threat of prosecution cannot prevent human error. Moreover, it would seem that the threat of almost certain death, for the aviators and their passengers should they fail, would be far greater encouragement to compliance.<sup>101</sup>

In the maritime context, similar sentiments were expressed following the recent unsuccessful prosecution of the master of the New Zealand inter-island ferry MV *Santa Regina*.<sup>102</sup> It may be that Just Culture is a utilitarian concept with relevance beyond the aviation community.

In the aviation context, the validity of the Just Culture argument from this utilitarian perspective may derive some support from the analysis of statistics provided in the most recent annual reports of CASA and the ATSB<sup>103</sup> in Australia and the CAA in New Zealand. The 2012–2013 Annual Report of the ATSB contains data for the total number of reported FSEs in Australia during the years 2008 to 2012.<sup>104</sup> In 2008 and 2009, the total

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<sup>100</sup> Malcolm Thorburn, *Criminal Law as Public Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 21–22 (R.A. Duff & Stuart P. Green eds., 2011).

<sup>101</sup> Samantha Sharif, *The Failure of Aviation Safety in New Zealand: An Examination of New Zealand's Implementation of Its International Obligations Under Annex 13 of the Chicago Convention on International Civil Aviation*, 68 J. AIR L. & COM. 339, 346 (2003).

<sup>102</sup> Kenneth D. Watt, *Letter: Ferry Captain was Wrongly Prosecuted*, DOMINION POST (Mar. 20, 2014), [www.stuff.co.nz/dominion-post/comment/letters-to-the-editor/9847395](http://www.stuff.co.nz/dominion-post/comment/letters-to-the-editor/9847395).

<sup>103</sup> The ATSB is the Commonwealth's official record keeper of all reported FSEs. AUSTRALIAN TRANSP. SAFETY BUREAU, DEP'T OF DEF., ATSB ANNUAL REPORT 2012–13, 56 (2013), available at [http://www.atsb.gov.au/media/4355822/ATSB\\_AnnualReport2012-13.pdf](http://www.atsb.gov.au/media/4355822/ATSB_AnnualReport2012-13.pdf).

<sup>104</sup> *Id.*

number was around 8000.<sup>105</sup> In 2010, it spiked to just over 8,500 and has remained steady at around that level since.<sup>106</sup> This represents an approximate 6.25% increase in FSEs over the period.<sup>107</sup> During this same period, CASA's Annual Report indicates a substantial increase in the number of cases referred for prosecution around 2010, with a return to the previous level of ten to fifteen per annum in the following years.<sup>108</sup> At the same time, the number of infringement notices issued by CASA has increased by about one quarter.<sup>109</sup>

The CAA's Annual Report for 2012–2013 indicates that between 2008 and 2012, the total number of reported FSEs in New Zealand remained relatively steady at around 6,000, with a sharp drop to 5,500 and fewer in 2009 and 2010.<sup>110</sup> The number of prosecutions initiated per year hovers at around twenty.<sup>111</sup> At the same time, the number of infringement notices has dwindled from ten in 2008 to four in 2012.<sup>112</sup> What is most interesting is that the year after the most number of prosecutions in the period were initiated,<sup>113</sup> the total number of FSEs actually increased by almost 10%.<sup>114</sup>

The best that can be said of the statistics is that there is no demonstrable correlation between prosecutions initiated as a consequence of FSEs and a reduction in the number of FSEs occurring subsequently. There are many variables which impact the usefulness of the statistics in this regard; patently, they cannot be regarded as either proving the case for Just Culture or, indeed, the contrary argument. However, one view of the data may suggest that Sharif is correct in her assertion that prosecution does not deliver an appreciable and apparent deterrent effect in the aviation community.<sup>115</sup>

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<sup>105</sup> *Id.* at 56–58. S

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> CIVIL AVIATION SAFETY AUTH., ANNUAL REPORT 2012–13, APPENDICES AND REFERENCES 179 (2013), available at [http://www.casa.gov.au/wcmswr/\\_assets/main/lib100228/ar1213\\_p6.pdf](http://www.casa.gov.au/wcmswr/_assets/main/lib100228/ar1213_p6.pdf).

<sup>109</sup> *See id.*

<sup>110</sup> CIVIL AVIATION AUTH. OF N.Z., ANNUAL REPORT 2012–2013, 96 (2013), available at [http://www.caa.govt.nz/about\\_caa/Annual\\_Reports/CAA\\_Annual\\_Report\\_2013.pdf](http://www.caa.govt.nz/about_caa/Annual_Reports/CAA_Annual_Report_2013.pdf).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Twenty-four in 2010. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *See Sharif, supra* note 101.

Does this mean that the prosecution of aviators following an FSE is inevitably a pointless exercise? The eminent legal philosopher, Professor Antony Duff, suggests not.<sup>116</sup> "We should criminalise certain wrongs in order to mark them out as public wrongs, which must be condemned as such, and for which their perpetrators should be called to answer; but that is not to say that we have good reason to criminalise *every* kind of wrongdoing."<sup>117</sup>

Accepting that this is a retributivist rather than utilitarian approach, Duff goes on to suggest that society should "criminalise only wrongs that cause or threaten harm to others."<sup>118</sup> There is a certain resonance here with the Just Culture ethos that punishment be reserved for "gross negligence, wilful violations and destructive acts."<sup>119</sup>

## VI. CONCLUSION

The purpose of this article has been to examine the extent to which the notion of Just Culture is or might be accommodated within the frameworks of law that apply to both civil and military aviation in Australia and New Zealand. In that respect, it identifies two streams of Just Culture. The first stream requires appropriate evidential separation between FSE investigations and enforcement investigations. The second represents an aspiration that prosecutorial discretion be exercised sparingly in aviation cases. There is little doubt that international aviation law already places significant impetus behind the first stream. This is reflected in Australian and New Zealand law to a very large degree.

The second stream of Just Culture is more problematic as current law and policy stands. As has been indicated, it cannot be applied in the case of New Zealand military aviators without an amendment to the Armed Forces Discipline Act.<sup>120</sup> For the remainder of the Australian and New Zealand aviation community, the matter turns on the exercise of prosecutorial discretion by the relevant enforcement authority.<sup>121</sup> There are already policy indications, particularly from the CAA in New Zealand, that

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<sup>116</sup> See R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 89 (2007).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 93.

<sup>119</sup> *Just Culture: Finding the Right Balance*, *supra* note 4.

<sup>120</sup> See *supra* text accompanying notes 96–98.

<sup>121</sup> See, e.g., *id.*

an approach akin to Just Culture may now be viewed with favor in at least some official quarters.<sup>122</sup> On the other hand, both countries still have a number of minor aviation offenses in their statute books which would not be required in that form if their Parliaments were committed to the application of Just Culture.<sup>123</sup> It may be that the *evolution* of not prosecuting for certain offenses is more palatable at this point than the *revolution* of repeal. There are parallels here with some other areas of the criminal law that have gradually faded from use.<sup>124</sup> Perhaps the time has come for a parliamentary re-examination of the use of infringement offenses for minor aviation offenses as an alternative to prosecution on both sides of the Tasman Sea.

There is doubtless greater scope for the application of Just Culture in both Australia and New Zealand. The commentary from the European Organization for the Safety of Air Navigation and our own Antipodean aviation safety data suggests that this represents an opportunity for something of a paradigm shift, in which Australia and New Zealand could assume a leadership role.<sup>125</sup> It remains to be seen whether that opportunity will be taken up.

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<sup>122</sup> See *supra* text accompanying notes 93–95.

<sup>123</sup> See, e.g., *supra* text accompanying notes 61–62, 90–92.

<sup>124</sup> See, e.g., Simon France & John Pike, *Criminal Law*, pt. V, para. 217, in *THE LAWS OF NEW ZEALAND* (Hon. Justice Sir John McGrath ed., 2013) (“The offense of blasphemy remains in the Crimes Act 1961 without, it must be thought, any particular room for application.”).

<sup>125</sup> See discussion *supra* Part I.